IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 362/2009**

In the matter between:

SWAZILAND MANUFACTURING & ALLIED WORKERS UNION (SMAWU) **Applicant**

and

TEX RAY SWAZILAND (PTY) LTD	**1st Respondent**
KARTATA INVESTMENTS	**2nd Respondent**
UNION INDUSTRIAL WASHING	**3rd Respondent**
KASUMI APPARELS TQM	**4th Respondent**
TEXTILES TALTEX SWAZILAND	**5th Respondent**
WEH TEC	**7th Respondent**
UNITED KNITTING	**8th Respondent**

CORAM:

S. NSIBANDE JOSIAH	**PRESIDENT**
YENDE NICHOLAS MANANA	**MEMBER**
	MEMBER

MR. A. FAKUDZE	**FOR APPLICANT FOR**
MR. S. SIMELANE	**RESPONDENT**

JUDGEMENT - 7th JULY 2009

(a) The Applicant is a trade union registered as such in terms of Section 27 of the Industrial Relations Act 2000 (as amended). Applicant alleges it is recognized as the bargaining agent for all unionisable employees of the Respondents.

(b) The Applicant has applied to the Industrial Court on notice of motion seeking and order in the following terms:

"1. Dispensing with the normal provisions of the Rules of this

Honourable Court as related to form, service and time limits ad hearing this matter as an urgent one;

(c) *Condoning the Applicant for the non-compliance with the said rules of court;*

(d) *Respondents to show cause why an order in the following manner must not be made final:*

(e) *Declaring that the conduct of the Respondents in by passing the Applicant and dealing directly with the members of the Applicant (sic) unlawful and unfair.*

(f) *interdicting and restraining the Respondents from negotiating wage/salary increments directly with members of the Applicant.*

(g) *Declaring that any purported agreement entered into by the Respondents with individual employees excluding the Applicant is null and void.*

(h) *That the Respondent is ordered to deduct from the wages of members of the Applicant that have signed a written authorization fees duly payable by the members of the Applicant and promptly remit the refunds to the Applicant.*

(i) *That the Respondents are ordered to pay the Applicant an amount equal to the sum the Applicant would have received had the Respondents not ceased to deduct union dues in respect of the Applicant's member's subscriptions in the last pay period.*

(j) *Ordering the Respondent to pay costs of suit on the attorney-client scale.*

(k) *That prayers 3.3 and 3.4 hereinabove opemto with immediate and interim effect.*

(l) *Further and/or alternative relief."*

(m) The Application is brought under a certificate of urgency and was served on the Respondents on the 15th June 2009. The Respondents were required to file in court their notices of intention to oppose and to attend court at 9.30 a.m. on 16th June 2009 for directives on how the matter would be dealt with including the time limits for filing of further prayers._

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(n) The Respondents appeared in court and after filing their intention to oppose, raised the following preliminary objections to the application:

(o) That the Applicant has not established sufficient grounds why the application should be heard urgently. Tied to this ground was the allegation that the Applicant had failed to comply with the peremptory requirements of Rule 15 (2) of the Industrial Court Rules 2007.

(p) That the Applicant has not satisfied the peremptory requirements for the grant of an interim interdict.

(q) That the Applicant's founding affidavit relied on hearsay evidence which is inadmissible and which cannot support the orders sought.

5. The court will deal with each preliminary point in turn:

(a) Urgency - Rule 15 (2) of the Industrial Court Rules 2007 requires a party applying for urgent relief to set f.-.rth explicitly in his rounding affidavit -

(i) the circumstances and reasons which render the matter urgent;

(ii) the reasons why the provisions V111 of the Industrial Relations Act (providing for prior conciliation of the dispute) should be waived; and

(Hi) the reason why the Applicant cannot be afforded substantial relief at a hearing in due course.

6. The Applicant makes the following averment in its founding affidavit with regard to urgency:

"41 I humbly submit that this matter is urgent because the parties have already set the process in motion which have been subverted by the Respondents' conduct and cannot continue until the misconduct has been stopped.

(r) *Further more the members of the Applicant who have indicated they will not consider or even cooperate with the Respondent in their prohibited practices and living in fear of being discriminated against, whilst those who do co-operate may be regarded as having done so through intimidation.*

(s) *The matter is also urgent by virtue of the fact that the prejudicial violation of the Applicant's rights to payment of union fees, to represent its members concerning all terms and conditions of employment including wages is currently on going and adversely affecting Applicant who will not be able to perform or meet its obligations.*

(t) *It is submitted further that Applicant cannot receive redress if the matter were to be dealt with under the provisions of Part V111 of the Act as by the time the matter is decided the Applicant stands to suffer irreparable harm."*

The Respondents' complaint regarding urgency is that the Applicant became aware of the alleged move to coerce its members into leaving the union on 7th May 2009 and only came to court a month later. It was said on behalf of the Respondents that on the strength of **Humphrey Henwood v Maloma Colliery High Court Case No. 623/93 and Dumisani Dlamini & 16 Others v SIYASPA (Pty) Ltd t/a Spar Nhlangano IC Case No. 23/09,** the application ought to be dismissed because of the unreasonable delay in launching the proceedings. The urgency, it was said, was self created.

(u) The Applicant does not base the urgency of its application solely on the events that came to its attention on 7th May 2009 and it states that the complaint it raised on 7th May 2009 was attended to by the Respondents by letter dated 11th May 2009. This court has previously held that **Humphrey Henwood v Maloma Colliers** supra is not authority for the

proposition that a party who first engages extracurial efforts to settle a dispute thereby loses the right to approach the court on an urgent basis when his efforts bear no fruit. (See **Vusi Gamedze v Mananga College Case No. 267/06).** In our view therefore the Applicant's attempt to engage the Respondents should not be held against it.

(v) The Applicant, however faces insurmountable obstacles in the area of compliance with Rules 15 (2) of the Industrial Court Rules 2007. The Rule enjoins an Applicant who seeks urgent relief to set forth explicitly:

(w) the circumstances and reasons why the provisions of Part V111 of the act should be waived; and

(x) the reasons why the Applicant cannot be afforded substantial redress at a hearing in due course.

10. Applicant states that its rights to union fees and to represent its members are adversely affected such that Applicant will not be able to perform or meet its obligations. In other words, non payment of union fees is resulting in financial loss for the Applicant. Financial loss on its own does not provide sufficient reason for a matter to be heard as a matter of urgency.

Further, the Applicant does not state what prejudice it will suffer if the matter is not heard urgently and is content to state only that if the matter were to be dealt with under the provisions of Part V111 of the Act by the time it is decided the Applicant stands to suffer irreparable harm. The point raised by the Respondents is upheld.

The Applicant's application must also fail on the basis that it has not shown that it has at least a prima facie right that is being infringed or that it reasonably foresees will be infringed. While Section 98 of the Industrial Relations Act 2000 and Section 32 of the Constitution of Swaziland Act guarantee worker's right to collective bargaining and freedom of association, a union acquires the right to bargain for employees and to collect union dues once it is recognized by an employer in terms of Section 42 of the Industrial Relations Act 2000. Nothing in the Applicant's papers indicate that it has been recognized by any of the Respondents but the 1st Respondent. It is common cause that the Respondents are separate !<=>rp' <*r may are caici lo be under the Tex Ray Group of Companies and it would be necessary that Applicant be recognized by each entity in order to establish the right to represent employees in each entity. In the absence of such agreements the

Applicant cannot be said to have a prima facie right to payment of union fees and to represent employers within the bargaining unit. In the absence of such prima facie right, the requirements for the grant of an interim interdict are not met and the point raised must be upheld.

In the circumstances the application is dismissed.

There is no order as to costs. **S. NSIBANDE**

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PRESIDENT OF THE INDUSTRIAL COURT